2010 WL 9545601 (Minn.App.) (Appellate Brief)
Court of Appeals of Minnesota.

In re the Estate of: Richard L. PERRIN, Decedent.

No. A10-1352.
October 27, 2010.

**Brief, Addendum, and Appendix of Appellant Commissioner of the Minnesota Department of Human Services**

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***1** LEGAL ISSUES

I. May Hennepin County properly assert a claim under Minnesota Statutes section 256B.15, subdivision 1(a), for reimbursement of Medical Assistance benefits received by a pre-deceased spouse from the estate of the community spouse?

The District Court determined that Hennepin County's claim under Minnesota Statutes section 256B. 15, subdivision la, for Medical Assistance reimbursement must be disallowed as a result of the Minnesota Supreme Court's holding in *In re Estate of Barg*, 752 N.W.2d 52 (Minn. 2008).

Apposite Authority:

*In re Estate of Barg*, 752 N.W.2d 52 (Minn. 2008).

Minn. Stat. § 256B.15, subd. la (2008).

II. If a claim under Minnesota Statutes section 256B.15, subdivision la, is permitted, is Hennepin County collaterally estopped from seeking satisfaction of that claim based on Minnesota Statutes section 519.05(a)?

The District Court concluded that *Barg* rendered a judgment on the merits of a Medical Assistance reimbursement claim under both Minnesota Statutes sections 256B.15, subdivision la, and 519.05(a), because the parties in their briefing had identified Minnesota Statutes section 519.05(a), as a potential basis for reimbursement during appellate briefing.

Apposite Authority:

*Hauschildt v. Beckingham*, 686 N.W.2d 829 (Minn. 2004).

*Green v. City of Coon Rapids*, 485 N.W.2d 712 (Minn. Ct. App. 1992).

*Parker v. MVBA Harvestore Sys.*, 491 N.W.2d 904 (Minn. Ct. App. 1992).

*Hauser v. Mealey*, 263 N.W.2d 803 (Minn. 1978).

*In re Estate of Barg*, 752 N.W.2d 52 (Minn. 2008).

III. Does application of Minnesota Statutes section 519.05(a)'s joint and several spousal liability satisfy a Minnesota Statutes section 256B.15, subdivision la claim do such substantial damage to federal objectives as to be preempted under the *Hisquierdo* standards for evaluating preemption?

***2** The District Court did not reach this issue having concluded collateral estoppel barred Hennepin County from seeking satisfaction under the spousal joint and several liability statute.

Apposite Authority:

*Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979).

Minn. Stat. § 256B.15, subd. la.

Minn. Stat. § 519.05(a).

***3 STATEMENT OF THE CASE**

Hennepin County filed a claim against the estate of Richard Perrin ("Perrin estate" or "Estate") under Minnesota Statutes sections 256B. 15, subdivision 1a, and 519.05(a), for recovery of $276,408.16 in Medical Assistance benefits received by Perrin's predeceased spouse, Dorothy Perrin. A.App. 6. The Estate's personal representative disallowed the claim, and the County petitioned for its allowance. A.App. 7-8. On February 3, 2010, the Honorable Jay M. Quam, judge of district court, signed the recommended order and findings ("Order") of District Court Referee Bruce Kruger disallowing the claim and holding that Hennepin County's claim against the Estate was barred by res judicata as a result of *In re Estate of Barg*, 752 N.W.2d 52 (Minn. 2008). A. Add. 1-5. The County filed a Notice of Motion and Motion for Review of Order under Minnesota Statutes section 484.70, subdivision 7(d). A.App. 61. The Commissioner of the Minnesota Department of Human Services ("Commissioner") intervened and filed a joint memorandum with the County in support of the County's motion for review. A.Add. 6; A.Add. 13-22.

The District Court affirmed the disallowance, reversing itself on application of res judicata but then concluding that collateral estoppel applied to preclude consideration of section 519.05. A.Add. 8-12. The Commissioner filed but later withdrew a motion to amend the Order and filed the present appeal to ensure review of the district court order and establish that the County's claim under section 519.05 is not collaterally estopped by Barg.

***4 STATEMENT OF FACTS**

Presently, this case is about whether the doctrine of collateral estoppel can operate to preclude the County and Commissioner from asserting sections 256B. 15, subdivision 1a, and 519.05 as a basis for recovery of Medical Assistance benefits. To facilitate consideration and resolution of this matter, the Commissioner will address, in his recitation of the relevant facts, the context and background for Medicaid recovery, the factual and procedural history of the Perrin estate, and the development and ultimate resolution of In re Estate of Barg, which is at the heart of the Perrin estate's collateral estoppel challenge.

**I. Medicaid Context And Background.**

The Commissioner seeks review of the district court order in this case to reverse a decision that bars arguments on the merits in a Medical Assistance recovery case. Because understanding the Medicaid context is necessary to determine whether collateral estoppel applies here, it is necessary to begin with a discussion of the Medicaid program as it relates to this case. Even though this case procedurally arose in a probate matter, Medicaid and estate recovery laws must be the primary framework for analysis.

**A. Medicaid Is A Social Welfare Safety Net Program.**

Congress created Medicaid in 1965 as Title XIX of the Social Security Act at the same time that it created Medicare as Title XVIII of the Act. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965). Unlike Social Security and Medicare, which are premised on a social insurance model in which individuals make specific contributions through payroll taxes entitling them to future benefits, Medicaid is ***5** based on a social welfare model in which society as a whole funds the current costs of benefits. The social welfare model is necessary because Medicaid was conceived as, and continues to be, a safety net program that is the payor of last resort intended only for those without sufficient resources to pay for their necessary medical care and services. Atkins v. Rivera, 477 U.S. 154, 156 (1986); *see also Estate of Atkinson v. Minn. Dep't of Human Servs.*, 564 N.W.2d 209, 210 (Minn. 1997). Medicaid was never intended to be free insurance for those who have adequate resources. *Meyer v. S.D. Dep't of Soc. Servs.*, 581 N.W.2d 151, 157 (S.D. 1998).

Medicaid's role as a social safety net program is reflected in its eligibility categories and criteria. There are two general categories of eligibility for Medicaid: those who are "categorically needy" and those who are "medically needy." *Atkinson*, 564 N.W.2d at

210-11. Medicaid coverage of the categorically needy is mandated as a condition of federal cost-sharing. *Id.* The categorically needy are recipients of cash assistance programs such as Temporary Assistance to Needy Families (which replaced Aid To Families Dependent Children) and Supplemental Security Income ("SSI"). *Id.; see* Minn. Stat. § 256B.055 (2004) (Minnesota eligibility categories). States also have the option of covering those who are not receiving cash assistance but who meet other income-related criteria (referred to as the "optional categorically needy"). Atkinson, 564 N.W.2d at 210-11.

Medicaid's second eligibility category covers those who are considered to be "medically needy." Individuals eligible under this category have resources that are otherwise sufficient for daily living expenses (based on state-determined income levels), ***6** but that are not adequate to pay for their medically necessary services. *Atkinson,* 564 N.W.2d at 210-11. Those with excess income or assets are required to "spend down" their assets on medical expenses until they meet an eligibility threshold similar to that for cash-assistance programs. *Id.*

Recipients in all categories must meet specific income and resource standards that are set by each state. *Id.* In Minnesota, individuals with assets over $3,000 and couples with assets over $6,000 are ineligible for Medicaid. Minn. Stat. § 256B.056, subd. 3 (2004). The value of a home, however, is excluded for institutionalized individuals until they cannot reasonably be expected to return home and the home is not used by a spouse or a dependant child as a primary residence. *See* Minn. Stat. § 256B.056, subd. 2 (2004). The result of this exclusion is that the home is usually the most significant asset that remains for post-death recovery. *West Virginia v. U.S. Dep't of Health & Hum. Servs.,* 289 F.3d 281, 284 (4th Cir. 2002).

**B. Medicaid's "Cooperative Federalism."**

Congress created Medicaid using its Spending Clause [1] powers. *See West Virginia,* 289 F.3d at 286. Unlike Social Security and Medicare, which are purely federal programs, Medicaid "is a cooperative endeavor in which the federal government provides financial assistance to participating states to aid them in furnishing [public] health... [insurance coverage] to needy persons." *Harris v. McRae,* 448 U.S. 297, 308 (1980). ***7** State participation in Medicaid is voluntary. *West Virginia,* 289 F.3d at 284. The federal share of Medicaid, known as "Federal Financial Participation," is between fifty and eighty-three percent - based on each state's per capita income. *Id.* at 284 n.2. Federal Financial Participation for Minnesota has historically been at fifty-percent, but has recently increased under the Recovery Act.

As with other Spending Clause-based laws, federal Medicaid payments are accompanied by certain broad conditions to which a state must comply in order to receive federal matching payments. *West Virginia,* 289 F.3d at 284. These conditions are found in the Medicaid Act and refined in its implementing regulations. 42 U.S.C. § 1396 et. seq.; 42 C.F.R. §§ 430-36, 440-42, 455-56. Within this Medicaid statutory and regulatory framework, participating states enact their own state-specific legislation and rules for the administration of their state programs. State laws and policies are then incorporated into State Medicaid Plans, which must be approved by the Secretary of Health and Human Services before a state may receive federal payments. 42 U.S.C. §§ 1396-1(2), 1396a. Congress intended Medicaid to provide states with flexibility in designing plans to meet each state's needs, and states are given considerable latitude in formulating the terms of their plans. *Wisconsin Dep't of Health & Family Servs. v. Blumer,* 534 U.S. 473, 495 (2002); *see also* 42 C.F.R. § 430.0 (2005) (noting that, within broad federal rules, each state decides its own eligibility, services, administration, and operation procedures). The result is that there is not one uniform national Medicaid program, but over fifty distinct Medicaid programs in states and territories. *Medicaid Program Investigation (Part 1): Hearing Before the Subcomm. on* ***8** *Oversight and Investigations of the H. Comm. on Energy and Commerce,* 102nd Cong. 58 (statement of Richard P. Kusserow, Inspector General, U.S. Department of Health and Human Services) (1991).

**C. Medicaid and Long-Term Care.**

Over Medicaid's forty-five-year history, the proportion of Medicaid spending for long-term care of the **elderly** has increased in relation to other services and populations. Currently, based on 2004 data, long-term care accounts for one-third of all Medicaid spending although less than ten percent of Medicaid beneficiaries use long-term care services. Pew Ctr. on the States, *Special*

*Report on Medicaid: Bridging the Gap Between Care And Cost,* A8 (2006). Medicaid spends over $77 billion for long-term care provided in nursing homes ($45.8 billion) and through home and community-based services ($31.7 billion). *Id.* In Minnesota in 2004, Medicaid spent $913 million for long-term care for the **elderly**. Minn. Dep't of Human Servs., *Public and Private Financing of Long-Term Care: Options for Minnesota,* 6 (2005).

Beginning in 1980, Congress began taking steps to restrain these long-term care costs by first allowing, and then by requiring, states to impose increasingly stringent eligibility penalties on transfers of assets and also by allowing states to impose liens on recipient's homes. [2] The purpose of these steps was to "assure that all of the resources ***9** available to an institutionalized individual, including equity in a home, which are not needed for the support of a spouse or dependent children will be used to defray the costs of supporting the individual in the institution." S. Rep. No. 97-494 at 38, *reprinted in* 1982 U.S.C.C.A.N. 781, 814 (1982). In addition to being a means of reducing spending, these efforts, largely aimed at eligibility, were also intended to prevent the use of Medicaid to "facilitate the transfer of accumulated wealth from nursing home patients to their nondependent children." H. R. Rep. No. 100-105, at 73; *reprinted in* 1988 U.S.C.C.A.N. 857, 896 (1988). Thus, by 1993, with the passage of the Omnibus Budget Reconciliation Act of 1993 ("OBRA 93"), Congress had significantly tightened asset rules and strengthened lien provisions so that a couple's resources were either used before a recipient spouse became Medicaid eligible or those resources were preserved for later recovery from a recipient's or a surviving spouse's estate. See Shawn Patrick Regan, Comment: Medicaid Estate Planning: Congress' Ersatz Solution For Long-Term Health Care, 44 Cath. U. L. Rev. 1217, 1227-28 (1995) (summarizing evolution of Medicaid transfer of assets and lien provisions through OBRA 93). As will be discussed shortly, Medicaid estate recovery is a logical extension of these tighter asset transfer and lien provisions because the assets preserved by those provisions will not be recovered without an effective recovery program. See General Accounting Office ("GAO"), *Medicaid: Recoveries From Nursing Home Residents' Estates Could Offset Program Costs,* at 5 (1989) (hereinafter "GAO, *Medicaid Recoveries"*).

***10 D. Long-Term Care And Spousal Anti-Impoverishment Reforms.**

While seeking to curtail **abuse** of Medicaid by those with resources, Congress in the 1980s also sought to remedy the problem of "spousal impoverishment." The income and assets of married couples are generally considered "available" resources, in full, to an institutionalized spouse seeking Medicaid eligibility. *Blumer,* 534 U.S. at 479-80. Thus, before 1988, if one spouse needed institutionalized care, married couples had to "spend down" all of their joint assets for the institutionalized spouse to achieve eligibility. Atkinson, 564 N.W.2d at 211. This spend down often left the noninstitutionalized spouse, known as the "community spouse," destitute. *Blumer,* 534 U.S. at 480. This destitution continued because, to maintain the institutionalized spouse's eligibility, the community spouse could only retain income up to a "maintenance need level" which was tied to the income limits for SSI or other cash assistance programs (depending on the state). See H.R. Rep. No. 100-105, 67-68, *reprinted in* 1988 U.S.C.C.A.N. 857, 890-91 (1988).

In 1988, to address the problem of spousal impoverishment, Congress included a number of Medicaid amendments in the Medicare Catastrophic Coverage Act of 1988 (MCCA). Pub. L. No. 100-360, § 303(a)(1)(B), (subsequently codified in relevant part at 42 U.S.C. § 1396r-5). Congress eased the financial hardship by revising the eligibility and asset allocation requirements - the main causes of spousal impoverishment. The MCCA allowed the community spouse to keep a substantial amount of otherwise available property (called the "Community Spouse Resource Allowance") without jeopardizing the institutionalized spouse's Medicaid eligibility. See 42 U.S.C. § 1396r-5(c)(2).

***11** These spousal anti-impoverishment changes increased Medicaid long-term care expenditures because institutionalized spouses became Medicaid-eligible faster (i.e., without having to spend down as much of their joint resources). See U.S. Dep't of Health and Human Servs., Office of Inspector General, *Medicaid Estate Recoveries: National Program Inspection,* iii-iv (1988) (hereinafter "OIG, *National Program Inspection"*) (noting estimates of the cost of spousal impoverishment reforms ranging from $410 million to $1.275 billion and "ascend[ing] steeply" in future years).

**E. Medicaid Estate Recovery.**

The consequence of eligibility criteria, tightened asset transfer restrictions, and spousal anti-impoverishment reforms is that some resources are temporarily excluded from eligibility calculations and in many cases could be left over after both spouses have passed away. [3] GAO, *Medicaid Recoveries* at 13-14. For example, a home is temporarily excluded as an available resource while it is needed by a community spouse. *West Virginia*, 289 F.3d at 284. The effect of this exclusion is that someone, despite having a potentially valuable asset in the form of home equity, can still qualify for Medicaid benefits at the same time as others who have fewer resources or who have had to spend down liquid assets. *Id.*

***12** Congress "addressed this anomaly through estate recovery." *Id.* [4] Estate recovery programs, through delayed recovery, require those whose primary assets are their homes to share the cost of their nursing care in the same manner as those whose assets are in more liquid form such as cash. *GAO, Medicaid Recoveries* at 2. In effect, the home is deemed temporarily unavailable for eligibility purposes if it is needed by a community spouse, but is available for purposes of recovery when it is no longer needed.

Estate recovery has been recognized from the beginning of the Social Security Act in 1935 and the creation of Medicaid in 1965. Flint Hills Center for Public Policy, *Kansas Estate Recovery Primer Volume 2: A National History of Estate Recovery*, § II (2005). These early recognitions placed conditions on states that limited the timing of recovery to after the death of the recipient and further delayed recovery if the recipient had a surviving spouse or a dependant child. Id. These same limitations on when recovery can be made have remained largely unchanged as part of Medicaid. See 42 U.S.C. § 1396p (a)-(b). Notably, the only limit on what states can recover is tied to the amount of the benefits received. *Id.* In addition, although estate recovery before 1993 was often described as "optional," with the implication that federal law served as a grant of authority, the more accurate view is that federal law never displaced the states' power to legislatively establish and define estate recovery other than in its timing and how much a state could claim. Estate of *Turner*, 391 N.W.2d767, 768 (Minn. 1986) ***13** (stating that although there is no inherent common law authority to recover assistance, the legislature may pass laws to recapture such funds); *see also David C. Baldus, Welfare As A Loan*, 25 Stan. L. Rev. 123, 125 (1973) ("Recovery laws have existed in the United States for more than 150 years.").

In the early 1980s, Congress loosened federal restrictions on when states could seek recovery. As noted above, this loosening was a complement to Congress's efforts to address the exploitation of eligibility loopholes through tighter asset transfer restrictions. Congress rescinded the prohibition on placing a lien on a home while the recipient was still living. 47 Fed. Reg. 43644 (Oct. 1, 1982). This change was aimed at helping prevent the transfer of a home to a family member or friend by an **elderly** person who anticipated the need for nursing home care, causing the home to escape recovery. *See* S. Rep. No. 97-494 at 38, 1982 U.S.C.C.A.N. at 814; *see also* 47 Fed. Reg. 43644.

In the mid and late 1980s, Congress instructed the Department of Health and Human Services ("HHS") and the General Accounting Office ("GAO") to study Medicaid estate recovery. HHS, *Issues in Medicaid Estate Recoveries: A Report to the United States Congress*, 1-2 (1989) (hereinafter "HHS, Issues in Medicaid Estate Recoveries"); GAO, Medicaid Recoveries at 1. These studies were aimed at identifying how estate recoveries could be an effective complement to other efforts in controlling Medicaid long-term costs, increasing nontax revenues, and lessening the fiscal impact of spousal anti-impoverishment reforms. HHS, *Issues in Medicaid Estate Recoveries* at 1-2; GAO, *Medicaid Recoveries* at 2-3; OIG, *National Program Inspection* at iv. These studies found that fewer than half of the states had estate recovery programs and ***14** concluded that mandating that all states implement recovery programs modeled after the most effective states could recover over half a billion dollars a year - primarily from the value of home equity. *See, e.g.*, GAO, *Medicaid Recoveries* at 3-4. The absence of effective estate recovery programs was also identified as a factor in **elderly** not using cost-containment strategies such as private long-term care insurance or relying on family care to delay admission to costly nursing homes. HHS, *Issues In Medicaid Estate Recoveries* at 3.

These reports set the stage for Congress's substantial expansion of Medicaid estate recovery through amendments included in the Omnibus Budget Reconciliation Act of 1993 ("OBRA 93"). Pub. L. No. 103-66, § 13612 (amending 42 U.S.C. §1396p(b)). Based on the above studies, and faced with the need to come up with program savings, administration, House, and Senate proposals all aimed to making estate recovery stronger. *See Administration's 1994 Health Budget: Hearing Before the Sen. Comm. on Finance,* 103d Cong. 90 (1993) (statement of Donna E. Shalala, Secretary of Health and Human Services); *Medicare and Medicaid Budget Reconciliation Act of 1993,* H.R. 2138, 103d Cong. § 5112 (1993) (as introduced May 17, 1993 by Rep. Henry A. Waxman); *Omnibus Budget Reconciliation Act of 1993,* S. 1134 § 7421 (1993) (as amended June 23, 1993). The final version of OBRA 1993 was signed into law August 10, 1993.

With the OBRA 93 amendments, Congress significantly reoriented Medicaid estate recovery. Whereas before estate recovery was simply permitted, OBRA 93 now required states to use estate recovery. The limitations as to when recovery could take place remained unchanged. Id.

***15** Congress also included in the OBRA 93 amendments a minimum definition for the term "estate" and a nonexhaustive and expansive allowance for states to go beyond that minimum definition in their estate recovery programs:

For purposes of [recovery of Medicaid funds], the term "estate," with respect to a deceased individual:

(A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and

(B) may include, at the option of the State (and shall include in the case of an individual [who has received benefits from a long-term care insurance policy]) any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

42 U.S.C. § 1396p(b)(4). Thus, the *minimum* floor of what is within an estate for required federal Medicaid recovery is set by state probate law. From this minimum floor, states are permitted to include an expansive range of property and assets connected to the decedent.

**F. Minnesota's Medicaid Estate Recovery Statute.**

Minnesota has had public welfare estate recovery laws since at least 1929. *Estate of Paulson,* 72 N.W.2d 857, 858-59 (1955). Minnesota's Medicaid estate recovery law, codified at Minnesota Statutes section 256B.15, dates from 1967, which marked the beginning of the state's participation in Medicaid. *Turner,* 391 N.W.2d at 768. Responsibility for estate recovery is delegated to Minnesota counties. Minn. R. 9505.0135, subp. 4 (2005). Relevant to the matter now before the Court is the requirement under Minnesota's estate recovery statute that:

***16** If a person receives any medical assistance hereunder, on the person's death, if single, or on the death of the survivor of a married couple, either or both of whom received medical assistance, the total amount paid for medical assistance rendered for the person and spouse shall be filed as a claim against the estate of the person or the estate of the surviving spouse in the court having jurisdiction to probate the estate.

Minn. Stat. § 256B.15, subd. la (2004). Such a claim is limited in that:

The claim shall include only the total amount of medical assistance rendered after age 55.... A claim against the estate of a surviving spouse who did not receive medical assistance, for medical assistance rendered for the predeceased spouse, is limited to the value of the assets of the estate that were marital property or jointly owned property at any time during the marriage.

Minn. Stat. § 256B.15, subd. 2 (2004).

Recovery from the estate of one spouse of the public welfare benefits received by the other spouse has a long history in Minnesota. *See Estate of Eggert*, 72 N.W.2d 360, 362 (1955) ("[T]he legislature was fully empowered to enact [a 1939 old age assistance provision] making the estate of one spouse subject to the claim for public assistance granted to the other."). The Legislature, by amendment, enacted Minnesota's Medicaid spousal recovery provisions in 1987. *Estate of Edhlund*, 444 N.W.2d 861, 862 (Minn. Ct. App. 1989). The amendments were in response to a 1984 court of appeals decision holding that a claim could not be filed against the estate of the surviving community spouse unless expressly authorized in statute. *Estate of Jobe*, 590 N.W.2d 162, 164 n.1 (Minn. Ct. App. 1999). The substance of these particular provisions have remained unchanged since 1987.

With this Medicaid estate recovery background as the context, Appellant now turns to the facts of this particular case.

***17 II. The Perrin Estate And Hennepin County's Recovery Claim History.**

Dorothy Perrin received $276,408.16 in Medical Assistance benefits prior to her death in March of 2004. A.Add. 2. Dorothy Perrin was survived by husband Richard Perrin. Richard Perrin died on July 11, 2006, having never received Medical Assistance benefits. A.Add.1-2; A.App. 10. Richard Perrin's estate consisted of the homestead, which ultimately sold in December of 2007 for $284,400, and cash in the amount of $12,800. The Perrin's home was the only significant asset in Richard Perrin's probate estate. A.App. 10; A.App. 46. The Perrins had owned the home as joint tenants until 1995 when Dorothy Perrin relinquished her interest by quit claim deed. A. App. 10-11; A.App. 46-47.

On September 19, 2006, David E. Culbert filed a Petition for Formal Probate of Will and for Appointment of Personal Representative. A.App. 1-5. On September 27, 2006, Hennepin County made a written statement of claim against Richard Perrin's probate estate seeking recovery of the value of Dorothy Perrin's Medical Assistance benefits. A.App. 6. On January 25, 2007, the Estate issued a Notice of Disallowance or Partial Allowance of Claim disallowing the claim "except for the interest of the pre-deceased spouse in the marital property that is limited to an undivided one-half interest in the martial property's value at the time of the death of the pre-deceased spouse which shall not exceed the amount of $149,500.00 which is allowed." A.App. 7. On February 7, 2007, Hennepin County petitioned for allowance of its claim to the extent it had been disallowed by the Estate. A.App. 8. On March 12, 2008, the Perrin estate filed an Amended Notice of Disallowance or Partial Allowance of Claim denying the County's ***18** claim in its entirety. A.App. 9. On March 21, 2008, the County petitioned for allowance of the claim, and the matter was set for hearing before District Court Referee Bruce Kruger.

During this same period of time, Mille Lacs County was pursuing a similar claim for reimbursement against the estate of a surviving spouse of a different beneficiary. The matter was being litigated as In re Estate of Barg. The parties in the present litigation agreed to continue their dispute pending the outcome in Barg, which presented facts and legal issues similar to those pending in the Perrin estate. On May 30, 2008, the Minnesota Supreme Court decided Barg concluding that Minnesota Statutes section 256B.15, subdivision 2, which allowed the State to reach assets not held by the pre-deceased spouse at the time of his or her death, was preempted by federal law. Barg, 752 N.W.2d at 52; A.App. 94.

Following Barg, Hennepin County renewed its petition for allowance and asserted that satisfaction of its claim was possible under section 519.05(a). That section is part of generally applicable family law and provides that spouses are jointly and severally liable for each other's necessary medical expenses. [5] In asserting that its claim could be satisfied under section 519.05, Hennepin County detailed the preemption analysis that applied to state family law statutes and explained that Barg had not conducted that analysis. A.App. 49. The Estate did not address the merits of the section 519.05 ***19** argument, arguing instead that section 519.05 had already been decided by silence in Barg and therefore Barg precluded the County from even raising the argument. A.App. 65-69.

On February 1, 2010, after briefing and oral argument on the merits of the claim, Referee Kruger issued an Order Disallowing and Denying Claim. A. Add. 1-5. On February 3, 2010, the Honorable Jay M. Quam countersigned the recommended order holding that the County's claim must be disallowed and that a claim for recovery under Minnesota Statutes sections 256B.15, subdivision la, and 519.05(a), was barred by res judicata as a result of the Barg decision. A.Add. 5.

On February 16, 2010, Hennepin County filed a Motion for Review under Minnesota Statutes section 484.70, subdivision 7(d). A.App. 61. The Commissioner filed a Notice of Intervention on March 1, 2010, which was granted on March 15, 2010. A.Add.6-7. The matter was heard, after briefing by the parties, on March 29, 2010. A.Add. 8. On June 3, 2010, Judge Quam affirmed his order. Id. The accompanying memorandum concluded that Hennepin County's claim was not barred by res judicata, but that the doctrine of collateral estoppel was an effective bar to the County's claim. A. Add. 9-12.

On July 7, 2010, the Commissioner filed a Motion to Amend Findings of Fact and Order. The Commissioner withdrew the motion on August 3, 2010, and filed the present appeal on August 4 2010.

***20 III. Barg Case Law Background And Argument Summary.**

As noted above, Hennepin County and the Perrin estate agreed to continue proceedings on the claim during the litigation of In re Estate of Barg.[6] *Barg* addressed two primary issues. First, it considered whether a recovery claim against a surviving spouse's estate was preempted if the surviving spouse did not himself receive Medical Assistance benefits. The court held that "federal law does not preclude all recovery from the estate of a surviving spouse, and the authorization in [Minn. Stat. § 256B.15] subdivision 1 a to make a claim against the estate of a surviving spouse is therefore not preempted." Id. at 68.

The second issue considered in *Barg* was whether federal law limited the scope of a recovery claim as allowed by Minnesota Statutes section 256B.15, subdivision 2. Subdivision 2 limits the amount of a claim against a nonrecipient surviving spouse's probate estate to the "value of assets of the estate that were marital property or jointly owned property at any time during the marriage." Minn. Stat. § 256B.15, subd. 2 (2008). The court held:

[Recovery under subdivision 2] is partially preempted to the extent that it authorizes recovery from the surviving spouse's estate of assets that the recipient owned as marital property or as jointly-owned property *at any time* during the marriage. To be recoverable, the assets must have been subject to an interest of the Medicaid recipient at the time of her death.

*Id.* at 71. The court further held that a recipient spouse has no recoverable interest in the marital homestead after she transferred her interest to the nonrecipient spouse. ***21** *Id.* at 72-73.[7] Thus, under *Barg*, Dorothy Perrin had no recoverable interest in the homestead in Richard Perrin's probate estate.

The County and Commissioner historically sought recovery of Medical Assistance benefits under Minnesota Statutes section 256B.15, subdivision 2, which was ultimately struck down in *Barg.* In this case, however, the County and Commissioner seek allowance of the claim under Minnesota Statutes sections 256B.15, subdivision la, and 519.05(a). Together, these provisions permit recovery of Medical Assistance claims from the estate of the surviving spouse and then look to the surviving spouse's interest to satisfy the claim - rather than the recipient spouse's interest, which was greatly limited under *Barg.*

**SCOPE OF REVIEW**

The parties agree on the material facts of this case, and the dispute to be resolved by this court focuses on two issues.

A first issue is the district court's erroneous conclusion that the County's claim had to be disallowed under Barg. Whether a claim for reimbursement under Medical Assistance is permissible under Minnesota Statutes section 256B.15, subdivision la, is a question of law. Appellate courts do not defer to a district court's application of the law when the material facts are not in dispute. *In re Estate of Grote*, 766 N.W.2d 82, 84-85 (Minn. Ct. App. 2009) (citing *Hubbard v.* ***22** *Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989)). Accordingly, whether the district court properly disallowed a claim against the Estate is a question of law and should be reviewed de novo.

The second issue for this court's review is whether collateral estoppel barred the County from seeking satisfaction of its claim under section 519.05's joint and several spousal liability. Whether collateral estoppel is available is a mixed question of law and fact. *Green v. City of Coon Rapids*, 485 N.W.2d 712, 718 (Minn. Ct. App. 1992) (citing *Regents of the Univ. of Minn. v. Medical Inc.*, 283 N.W.2d 201, 207 (Minn. Ct. App. 1986)). The trial court's determination regarding the availability of collateral estoppel does not bind this court. Id. Once the reviewing court determines that collateral estoppel is available, the decision to apply collateral estoppel is left to the trial court's discretion. *Regents of the Univ. of Minn.*, 283 N.W.2d at 207. The trial court will be reversed only upon a determination that the court **abused** its discretion. *Saudi Am. Bank v. Azhari*, 460 N.W.2d 90, 92 (Minn. Ct. App. 1990); *see Green*, 485 N.W.2d at 718. In deciding whether to apply collateral estoppel, the focus is on whether application would work an injustice on the party to be estopped. Green, 485 N.W.2d at 718 (citations omitted). The party moving for collateral estoppel bears the burden of establishing that collateral estoppel applies. Parker v. MVBA Harvestore Sys., 491 N.W.2d 904, 906 (Minn. Ct. App. 1992).

***23 ARGUMENT**

**I. In Re Estate Of Barg Clearly Permits A Claim Against The Estate Under Minnesota Statutes Section 256B.15.**

Minnesota law requires that a claim be filed against the probate estate of a surviving spouse if one or both of the spouses received Medical Assistance benefits after the age of 55. *See* Minn. Stat. § 256B.15, subd. la (2008). Subdivision la states in relevant part:

> If a person receives any medical assistance hereunder, on the person's death, if single, or on the death of the survivor of a married couple, either or both of whom received medical assistance, or as otherwise provided for in this section, the total amount paid for medical assistance rendered for the person and spouse *shall be filed as a claim* against the estate of the person or the estate of the surviving spouse in the court having jurisdiction to probate the estate or to issue a decree of descent according to sections 525.31 to 525.313.

Minn. Stat. § 256B.15, subd. la(a) (emphasis added); *see also* Minn. Stat. § 256B.15, subd. la(e) (stating that a claim against the estate "shall be filed").

The Minnesota Supreme Court, in its decision *In re Estate of Barg*, 752 N.W.2d at 68, considered whether the statutory requirement that such a claim be filed was preempted by federal law. The Court ultimately upheld the requirement stating:

> [W]e hold that federal law does not preclude all recovery from the estate of a surviving spouse, and *the authorization in subdivision la to make a claim against the estate of a surviving spouse is therefore not preempted.*

*Id.* (emphasis added). In essence, *Barg* affirmed that the State, or a county on its behalf, must file claims for recovery of Medicaid benefits against the estate of a surviving spouse under Minnesota Statutes section 256B.15, subdivision 1a. Accordingly, the district ***24** court's February 3, 2010 order disallowing the County's claim is incorrect as a matter of law and must be reversed.

The proceedings in this case illustrate that there may be confusion as to the effect of Barg's holding, which is that a subdivision la claim is not preempted by federal Medicaid law, in the context of probate law. The district court ordered the disallowance

of the County's claim. A disallowance, however, is not warranted. Instead, as outlined below, it appears that the district court may have intended to give effect to its finding that there were no assets in the estate from which a recovery claim could be satisfied. When rather, the district court should have allowed the claim and identified the assets, if any, available from which to satisfy the claim. Accordingly, in addition to reversing the February 3, 2010 order disallowing the County's claim, the matter should be remanded for findings and conclusions regarding assets of the Estate that are available to satisfy the claim - in other words, whether this valid claim should be paid.

**II. Collateral Estoppel Is Not Available Because Barg Did Not Result In A Judgment On The Merits Of Joint And Several Spousal Liability Under Section 519.05.**

Collateral estoppel is a narrow and equity-based doctrine that has no application here. Collateral estoppel "applies to specific legal issues that have been adjudicated and is also commonly and accurately known as 'issue preclusion.'" *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004); *see also U.S. v. Mendoza*, 464 U.S. 154, 159, 104 S. Ct. 568, 571 (1983). Collateral estoppel has four prongs, all of which must be met for it to apply:

> ***25** (1) the issue must be identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or was in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

*Id.* The law is clear that the party moving for issue preclusion bears the burden of establishing that the issue was necessarily determined by the prior verdict. *See Parker v. MVBA Harvestore Sys.*, 491 N.W.2d 904, 906 (Minn. Ct. App. 1992); Barth v. Stenwick, 761 N.W.2d 502, 508 (Minn. Ct. App. 2009). [8]

Here, the Perrin estate has not, and cannot, establish the second required element - final judgment on the merits - to allow collateral estoppel to apply.

**A. The Barg Decision Fails To Issue A Judgment On The Merits Of A Claim For Recovery Under Section 519.05(a).**

The issue on which collateral estoppel is to be applied "must be the same as that adjudicated in the prior action and it must have been necessary and essential to the resulting judgment in that action. *Parker*, 491 N.W.2d at 906. The issue must have been distinctly contested and *directly determined* in the earlier adjudication for collateral estoppel to apply." *Id.* at 837-38 (emphasis added; citations omitted); *Green v. City of Coon Rapids*, 485 N.W.2d 712, 718 (Minn. Ct. App. 1992). In Minnesota, issue ***26** preclusion "must rest upon a more solid basis than mere speculation as to what was actually adjudicated in the prior action." *Parker*, 491 N.W.2d at 906; *see also Canal Capital Corp. v. Valley Pride Pack, Inc.*, 169 F.3d 508, 514 (8th Cir. 1999).

Regarding judgment on the merits, the Minnesota Supreme Court has held:
If... 'the judgment might have been based upon one or more of several grounds, but does not expressly rely upon any one of them, then none of them is conclusively established under the doctrine of collateral estoppel, since it is impossible for another court to tell which issue or issues were adjudged by the rendering court.'

*Hauser v. Mealey*, 263 N.W.2d 803, 808 (Minn. 1978) (citing 1B Moore, Federal Practice (2 ed.) part 0.443(1), p. 3915). Similarly, a court cannot rely on a prior judgment as the basis for applying collateral estoppel if that judgment might have been decided on one or more of several grounds, and it does not explicitly state which one(s) it relied on. Parker, 491 N.W.2d at 906.

The Estate argues relentlessly, but without substance, that Barg considered and rejected joint and several liability under section 519.05(a) as a basis for recovery of Medical Assistance benefits. The error in this argument is apparent with a thorough understanding of the lengthy Barg litigation and holdings beginning with the district court proceedings.

**1. The district court in Barg applied intestacy law and concluded that Dolores Barg held only a life estate interest that was available for medical assistance recovery.**

At the district court, the Barg litigation focused on recovery of Medical Assistance benefits provided to Dolores Barg. Barg, 752 N.W.2d at 57. The parties agreed on the following relevant facts. Dolores received Medical Assistance benefits totaling ***27** $108,413.53 for nursing home care and related medical care. Id. Dolores was survived by her spouse, Francis Barg. Id. The Bargs' primary asset during their marriage was their homestead. Id. Prior to her receipt of Medical Assistance, Dolores transferred her interest in the home as well as all her other assets to Francis. Id. When Francis died, the estate value totaled $146,446.29. The homestead value, included in the estate, was $120,800. Id.

After Francis Barg's death, Mille Lacs County made a claim under Minnesota's medical assistance recovery statute - section 256B.15, subdivisions 1a and 2 - against Francis' estate for reimbursement of the Medical Assistance benefits received by Dolores. *Id.* The County's claim totaled $108,413.53. *Id.* The Barg estate allowed only $63,880 of the County's claim. *Id.* The parties' dispute over the remaining $44,533.53 was heard in district court. *Id.*

The district court ultimately determined that Dolores retained some interest in the homestead at her death and, relying on intestacy law as a method of valuing that interest, determined that Dolores' interest at the time of her death was a life estate. Id. The County's claim was permitted in the amount of $63,880, which was the value of her life estate and a personal allowance.

**2. The Court of Appeals in Barg rejects intestacy law and applies real property law to conclude that Dolores' interest is one-half of her joint interest in the homestead.**

The parties' dispute over the allowance of the claim and the amount of the claim continued at the court of appeals with Mille Lacs County filing the notice of appeal. *Barg,* 752 N.W.2d at 58. Mille Lacs County's arguments on appeal have some bearing ***28** on the present litigation. On appeal, Mille Lacs County argued that Minnesota's estate recovery laws at section 256B.15, subdivision 2, limited the County's recovery to Dolores "marital property" and further defined marital property to include "the value of the assets ... that were marital property or jointly owned property *at any time* during the marriage." A.App. 70-77. The County concluded accordingly that Dolores' interest in the homestead was marital property. *Id.* The County looked to Minnesota statutes for a definition of "marital property," which is defined only in chapter 518 concerning marital dissolution. *Id.* Section 518.54, subdivision 5, defines each spouse's interest in martial property as a joint interest - or a presumptive undivided interest in the whole.

The County also, as a final reason to apply the state law definition of marital property and make available the undivided interest of the whole, pointed out that the Minnesota Legislature noted other contexts in which a spouse can be held jointly and severally liable for the debts of another. A.App. 77. In doing so, the County stated:
Although generally a spouse is not liable for the debts of the other spouse, the Legislature has expressly made an exception "for necessary medical services that have been furnished to either spouse." Minn. Stat. § 519.05 (2004). For these debts, a husband and wife are jointly and severally liable. Id. Such liability is congruent with how the Legislature has defined a couple's mutual responsibility for Medicaid recoveries. See Minn. Stat. § 256B.15, subd. 2.

A.App. 77. The Barg estate did not respond to the County's section 519.05 argument. There was no further mention of section 519.05 in the response, reply, or amicus briefs submitted at the court of appeals.

The court of appeals ultimately rejected marital and probate law as relevant concluding instead that "the plain meaning of the estate-recovery statute requires us to ***29** apply property-law principles as specifically modified by the statute." Barg, 722 N.W.2d at 497. In so reaching, the court of appeals concluded that Dolores Barg had a joint-tenancy interest in the property

remaining in Francis Barg's estate and that her interest was acquired during the marriage. Id. The court of appeals then, citing Kipp v. Sweno, 683 N.W.2d 259, 260, 263 (Minn. 2004), reasoned that the "extent of her interest" was defined by joint tenancy, which is an undivided one-half interest in the property's value. The court of appeals ultimately reversed the district court and remanded the matter for calculation based on real property laws. Id. The court of appeals decision made no mention of section 519.05.

**3. The Minnesota Supreme Court in Barg affirms the county's ability to seek recovery against the estate of a surviving spouse and then holds that preemption limits the scope of recovery to the interest of the recipient spouse retained in the estate at the time of her death.**

Mille Lacs County again pursued appeal of these issues at the Minnesota Supreme Court. In its briefing, the County alternatively argued that if that court affirmed the court of appeals' holding that Dolores had a one-half interest at her time of death, then Francis's statutory joint and several liability for Dolores' necessary medical expenses allows recovery from the homestead interest held by Francis. A.App. 78-80.

The Barg estate challenged the joint and several spousal liability argument stating, in significant part, that recovery relying on liability under section 519.05 would be preempted by federal Medicaid recovery statutes that limit recovery to the recipient spouse's interest. A.App. 81-83. The County asserted that section 519.05 was not preempted because preemption analysis of a state family law is governed by ***30** *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979), which requires that state family and family-property law must do "major damage" to "clear and substantial" federal interest before Supremacy Clause will override the state law. A.App. 84-87. The County claimed that the Barg estate failed to met this test. *Id.*

In deciding *Barg*, the Minnesota Supreme Court determined three issues: 1) whether federal law preempts the authorization in Minnesota Statutes section 256B.15, subdivision 1a, for recovery of Medicaid benefits paid for a recipient spouse from the estate of the surviving spouse; 2) if such recovery is not preempted, whether federal law limits the recovery to assets in which the recipient had an interest at the time of her death, preempting the broader recovery allowed in Minnesota Statutes section 256B. 15, subdivision 2, as to assets owned as marital property or in joint tenancy at any time during the marriage; and 3) if recovery is limited to assets in which the recipient had an interest at the time of her death what, if any, interest did Dolores Barg have in the homestead. *Barg*, 752 N.W.2d at 63. Significantly, the Court did not list, as an issue to be determined in this litigation, whether the interest of the surviving spouse is available for recovery via the joint and several spousal liability statute, section 519.05.

The *Barg* court concluded that federal law did not preempt recovery from the estate of a surviving spouse under Minnesota Statutes section 256B. 15, subdivision la. *Id.* at 68. The remainder of the Barg court's opinion focused on the interests of the recipient spouse that remained in the surviving spouse's estate that were subject to recovery. *See id.* at 68-74. The Barg court did not consider whether the surviving spouse's assets were otherwise available for recovery.

***31** Accordingly, the *Barg* decision contains no analysis on this point and, specifically, contains no *Hisquierdo* analysis, which would be required before the court could determine that recovery from the surviving spouse's interest in the estate, based on state family law, was preempted. *Barg*, for whatever unknown reasons, left the question of joint and several spousal liability open. Precedent should be established by what is actually adjudicated and not what is omitted by intention or oversight.

Because Barg failed to answer the question of whether a surviving spouse's interest in the homestead is available for recovery of medical assistance benefits under Minnesota Statutes section 519.05(a), the issue was not adjudicated on the merits and collateral estoppel cannot bar the County's claim here. [9]

Even if this court decides that collateral estoppel is available, it should not be applied in this case. To apply collateral estoppel in a situation such as this would permit and encourage future parties to cite case law as precedent for any alternative argument raised by the parties in briefing - regardless of whether the argument was acknowledged or addressed in the court's decision.

Doing so greatly and unreasonably expands the current concept of precedent. Accordingly, application of collateral estoppel would constitute an **abuse** of discretion that should be reversed.

***32 III. This Court Should Remand To The District Court With Instructions To Consider The Merits Of Hennepin County's Claim, Which Is That Joint And Several Liability Permits The County To Recover Its Valid Medical Assistance Claim From Estate Assets In Which Richard Perrin Alone Held An Interest.**

Although the matter should be remanded to the district court, a summary of the premise for the County's claim is presented herein. Hennepin County's assertion that Richard Perrin's interest in the Perrin estate is available for recovery of the Medical Assistance claim stems from Minnesota Statutes section 256B.15, subdivision la, and Minnesota Statutes section 519.05(a). Barg upheld section 256B.15, subdivision la, and permits a claim to be made against a surviving spouse's estate. The remaining issue for the County's claim is whether recovery from the surviving spouse's interest, using a state family law statute as authority, is federally preempted.

To determine whether a state family law is federally preempted, the analysis to be applied is set out in Hisquierdo, 439 U.S. at 581. Matters involving domestic relations typically present no federal question. On rare occasions when state family law has come into conflict with a federal state, the United States Supreme Court has limited review under the Supremacy Clause to determine whether Congress has "positively required by direct enactment" that state law be preempted. Id. The court's review follows a two-step process: 1) whether the state law conflicts with the express terms of federal law; and 2) whether the consequences of the conflict "sufficiently injure the objectives of the federal program to require nonrecognition." Id. at 583. The Supreme Court provides this additional guidance for review of such conflicts:

> ***33** A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden.

*Id.* at 581 (citing *United States v. Yazell*, 382 U.S. 341, 352 (1966)).

Assuming for argument's sake that the authority in section 519.05(a) to reach the surviving spouse's interest for Medical Assistance recovery is in conflict with federal law, the analysis does not stop here under *Hisquierdo.* A court must consider whether allowing section 519.05(a) to operate in this fashion does major damage to a clear and substantial federal interest.

The County's district court memorandum, reproduced in Appellant's Appendix, clearly articulated why the joint and several spousal liability statute inflicts no major damage to federal Medicaid objectives. See A.App. 49-59. In brief, the objectives of the federal limitation of recovery to a recipient spouse's estate are twofold: 1) to preserve a couple's assets for use by the couple for their support during their lifetimes; and 2) to delay recovery until after the death of a recipient's surviving spouse or any dependent or disabled child. See 42 U.S.C. §§ 1396p(b)(1)(B) and 1396p(b)(2). In essence, Congress intended recovery of Medical Assistance benefits to be delayed until after both the recipient and her spouse have died.

Section 519.05(a), when used in conjunction with section 256B.15, subdivision 1a, permits the County to seek recovery from the surviving spouse's estate only after the death of both the Medical Assistance recipient and the surviving spouse. See Minn. Stat. § 256B.15, subd. la (authorizing a recovery claim upon the death of a surviving spouse); Minn. Stat. § 519.05(a) (establishing liability of a spouse for the medically ***34** necessary services received by his or her spouse). It is without dispute that Richard Perrin had free use of the couple's assets, including the homestead, during his lifetime to provide for his support. Neither the County nor the Commissioner encumbered Perrin's assets through liens or by any other mechanism. It is only upon death of both spouses that the County now seeks to recover Medical Assistance benefits paid on behalf of Dorothy Perrin. Accordingly, the federal objective is not frustrated whatsoever by application of section 519.05(a) to matters of estate recovery. Therefore, in

the language of *Hisquierdo*, no major damage is inflicted upon the objectives behind federal Medicaid provisions by allowing application of Minnesota's spousal liability statute here.

Accordingly, the County's claim under Minnesota Statutes sections 256B.15, subdivision 1a, and 519.05(a), has merit, is not preempted by federal law, and should be heard and decided by the district court.

## *35 CONCLUSION

For these reasons, the Commissioner respectfully requests that this Court reverse the district court order denying and disallowing the Commissioner's claim against the estate and applying the doctrine of collateral estoppel to preclude the Commissioner from seeking Medical Assistance recovery under Minnesota Statutes sections 256B.15, subdivision la, and 519.05. The Commissioner also respectfully requests that this Court remand the matter to district court for hearing on the merits of the Commissioner's claim of recovery against the Estate.

Footnotes

1 U.S. Const. art. 1, § 8, cl. 1 (“The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States ....”).

2 Congress's efforts have continued through the present. On February 1, 2006, Congress passed the Deficit Reduction Act of 2005 which included Medicaid amendments to, *inter alia*, extend the “look-back” period from three to five years for asset transfers that trigger ineligibility for long-term care. *Deficit Reduction Act of 2005, S. 1932,* 109th Cong. 1st Sess. § 6011 (2006).

3 Congress recently amended the spousal anti-impoverishment provisions in a way that ensures that more of a couple's resources will be available to pay for care during eligibility or be preserved for later estate recovery. *See Deficit Reduction Act* of 2005, § 6013 (requiring states to use the “income first” method for allocating resources between a community spouse and an institutionalized spouse); see also Blumer, 534 U.S. at 484-85 (discussing “income first” and “resource first” methods).

4 Congress has recently begun to also address this home equity anomaly by disqualifying individuals with more than $500,000 in home equity for Medicaid long-term care (unless a community spouse or dependent child resides in the home). *Deficit Reduction Act of 2005, § 6014.*

5 Although section 519.05 had been raised as an alternative in Barg at the Supreme Court, the Court's opinion was silent on its application and its validity under the Supremacy Clause, therefore leaving the application of section 519.05 an open question.

6 The court of appeals and Minnesota supreme court decisions in Barg are included in Appellant's Appendix at A.App. 88-93 and A.App 94-116, respectively.

7 Following Barg, the Minnesota Legislature amended section 256B.15 to recognize a marital property interest as a legal title interest for purposes of Medical Assistance benefit recovery. 2009 Minn. Laws ch. 79, art. 5, sec. 41-42. That amendment, however, only applies to recipients who died on or after July 1, 2009. *Id.* at sec. 41.

8 Collateral estoppel is scrutinized more carefully when a private litigant seeks to assert collateral estoppel against the government. *See Mendoza,* 464 U.S. at 159, 104 S. Ct. at 572. “[T]he government is not in a position identical to that of a private litigant, because of the geographic breadth of government at litigation and also, most importantly, because of the nature of the issues the government litigates.” *Id.* (citations omitted). The United States Supreme Court notes that “it is not open to serious dispute that the government is a party to a far greater number of cases ... than even the most litigious private entity.” *Id.*

9 In addition, this court could also find that collateral estoppel fails on the first element - identical issue in prior adjudication. *Hauschildt,* 686 N.W.2d at 837. The issue in Barg, as framed by the Supreme Court, was recovery from the recipient's interest in the estate. Barg, 752 N.W.2d at 63. In contrast, the issue in the present case is recovery from the surviving spouse's interest in the estate based on his liability under section 519.05.

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